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Nos. 16-1436 & 16-1540

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, A PROJECT OF THE URBAN JUSTICE CENTER, INC., ON BEHALF OF ITSELF AND ITS CLIENTS, *et al.*,

Respondents.

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF FOR T.A., A UNITED STATES CITIZEN OF YEMENI DESCENT, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus files this brief in support of Respondents. This brief offers a narrow but dispositive basis for affirming: the Government does not even assert a vetting justification for the June 14, 2017 extension of the travel and refugees bans. The purported reason for the bans had been to enable the Administration to establish "adequate" vetting. However, this Administration stated that it had implemented its *own* "extreme vetting" procedures by June 5, 2017—before the extension and while the bans were enjoined. The Government does not assert that this Administration's "extreme vetting" procedures may be inadequate for nationals of the six countries designated in the Amended Executive Order ("Amended Order") or refugees. Thus, the ongoing bans contradict their own rationale.

T.A.[1] is a United States citizen who was raised in Yemen. T.A. is a Muslim. T.A.'s father and many members of T.A.'s extended family hold Yemeni passports and reside abroad. The Amended Order would bar them from entering the United States. Although the Government states that banned persons "could" apply for "[c]ase by case" waivers under Section 3 of the Amended Order,

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1. This amicus brief uses initials, rather than T.A.'s full name, to reduce the risk of potential reprisals to T.A. or his family members. This Court has permitted litigants to use pseudonyms and initials in similar circumstances. *See, e.g., Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000). No counsel for any party authored the brief in whole or in part, and no person or entity other than amicus made a monetary contribution to its preparation or submission. Petitioners have filed a blanket letter of consent. Consent from Respondents has been lodged with the Clerk's office.

Section 16(c) provides that nothing in the Amended Order provides any "enforceable" right, "substantive or procedural." J.A. 1440. The Amended Order does not even provide for any *un*enforceable opportunity to be heard as to any purported reason to deny a waiver, any timing for or notification of a denial, much less any reason, or any ability to appeal a denial.

SUMMARY OF ARGUMENT

This brief focuses on one narrow but dispositive basis for affirming: the Government's failure even to assert that the travel and refugee bans are still justified by vetting concerns *after* this Administration implemented its *own* "extreme vetting." By June 5, 2017, this Administration had achieved "extreme vetting," and a resulting 55% reduction in visas to nationals of the six nations designated by the Amended Order, while the travel ban was completely enjoined. *After* achieving "extreme vetting" and the 55% reduction, the President *extended* the bans on June 14, 2017. Because the Administration had surpassed the Amended Order's goal of adequate vetting before that extension, there is not even a purported finding of detriment for the extended bans. Lacking such a justification, the bans contravene both the statutory limits on the President and the Establishment Clause.

Part I of this brief demonstrates that this Court's function includes comparing the asserted rationale for the Amended Order with the public record of subsequent Administration statements and official statistics.

Part II demonstrates that the Administration's own official explanations and fficial statistics negate vetting

concerns as a basis for sustaining the ongoing travel and refugee bans. The Government had represented that the bans would be "temporary" so that the Administration could establish vetting procedures that "are adequate to detect terrorists." *Infra*, at 14. Yet, on June 14, 2017, the Administration extended the bans *after* it had established "extreme vetting" by June 5, 2017. Before the extension, this "extreme vetting" already had resulted in a 55% reduction in visas to nationals of the six countries designated by the Amended Order *while* the travel ban was completely enjoined.

Part III demonstrates that, in accord with the texts of the pertinent statutes and the Establishment Clause, the Court should enjoin all prospective applications of the Amended Order's illegal travel and refugee bans.

BACKGROUND

A. President Trump's Campaign Promise To Ban Muslims.

President Trump made repeated campaign promises to order a "shutdown of Muslims entering the United States . . . ." J.A. 1050. The President stated during the campaign that the ban would be dressed up in different clothes: "I'm talking territory instead of Muslim." *See* J.A. 1015, 1133 (citing *Meet the Press* (NBC television broadcast July 24, 2016), transcript *available at* https://goo.gl/jHc6aU); *see also* https://youtu.be/YRezlhHA9Vg?t (Trump to Sean Hannity on July 25, 2016: "People don't want me to say Muslim. I guess I prefer not saying it, frankly, myself. So we're talking about territories.").

B. The Amended Order "Deliver[s] On" The President's "Campaign Promises."

On March 6, 2017, President Trump issued the Amended Order. J.A. 1416-1440. The next day, the White House Press Secretary, in *prepared* remarks made before taking questions from reporters, heralded the Amended Order as the fulfillment of President Trump's campaign promises: "President Trump yesterday *continue[d]* to *deliver on . . .* his *most significant campaign promises*: protecting the country against radical *Islamic* terrorism." Brief of *Amicus Curiae* T.A., Ex. 2, CV. No. 17-00050-DKW-KJM, *Hawaii v. Trump* (D. Haw. Mar. 14, 2017), ECF No. 201-2 (Press Briefing by Press Secretary Sean Spicer (Mar. 7, 2017), *available at* http://bit.ly/2mW39oB) (emphasis added).

Moreover, on March 15, 2017, President Trump stated at a rally not only that the Amended Order was a "watered-down version of the first order," but also that both Orders were justified by "radical *Islamic*" terrorism. J.A. 183 (citing Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak'*, Time (Mar. 16, 2017), *available at* http://ti.me/2o09ixe) (emphasis added).

The President's statements in early June 2017 about terror attacks in London demonstrate that banning Muslims is the reason for the Amended Order. Within an hour of a June 3, 2017 terror attack in London, the President tweeted that it showed why "[w]e need the Travel Ban . . . ." Donald J. Trump (@realDonaldTrump), Twitter (June 3, 2017 4:17 p.m.), http://bit.ly/2rzYrwd. He added the next morning: "We must stop being politically

correct." Donald J. Trump (@realDonaldTrump), Twitter (June 4, 2017 4:19 a.m.), http://bit.ly/2qQRn1e.

But President Trump never had any basis to believe that any of the three London attackers would be covered by the Amended Order's bans. Indeed, *the Amended Order's bans would not have applied to the London attackers.* One was a British national; another was an Italian national; and the third was a national of Morocco and perhaps also had Libyan roots. CBS/AP, *Who were the London attackers? Chef, clerk and 'suspicious' Italian*, CBS News (June 6, 2017 6:46 p.m.), http://cbsn.ws/2g1LWYq (identifying three London attackers as (1) Khurum Butt, "a Pakistan-born failed customer service clerk"; (2) Rachid Redouane, "a Moroccan pastry chef . . . who claimed to have both Moroccan and Libyan roots"; and (3) Youssef Zaghba, "an Italian man").

The Amended Order does not apply to British, Italian, or Moroccan nationals, or dual nationals who travel under their status as a national of a non-designated country. *See* Pet. Br. at 49 n.160; J.A. 1428 §§ 3(b)(iii), (iv). Moreover, none of the London attackers had been screened by, and passed, the equivalent of what President Trump described on June 5, 2017 as his Administration's current "EXTREME VETTING." *Infra*, at 23.

The President's statements *as President* about the London attackers thus confirm that the basis for the Amended Order's bans has never been concerns about the adequacy of vetting procedures, abroad or at home, for nationals of the six countries or refugees. Rather, the President's blunt statements on June 3-4, 2017 show that the basis for his bans always has been fulfilling his pledge to ban Muslims.

C. T.A.

T.A. is a Muslim and a United States citizen who grew up in Yemen. When T.A. was eighteen, he returned to the United States to attend college. He lives here and has been a videographer.

T.A.'s father, aunts, uncles, and cousins—all of whom hold Yemeni passports—now live in Jordan, where they fled as refugees from the ongoing Yemeni Civil War. Many of them want to travel to the United States to visit T.A. and their extended family. In particular, T.A.'s cousin, with whom he is close, wishes to travel to this country to look at schools and visit his brother, a U.S. citizen, as well as T.A. The Amended Order would bar T.A.'s father, cousin and his extended family from traveling to this country.

D. The Decisions Below.

On March 16, 2017, the Maryland District Court issued a preliminary injunction barring enforcement of Section 2(c) of the Amended Order. *See* J.A. 117, 166. The Maryland District Court found that "the record provides strong indications that the national security purpose is not the primary purpose for the travel ban." J.A. 157. The Maryland District Court further found that the Government had "not shown, or even asserted that national security cannot be maintained without an unprecedented six-country travel ban." J.A. 163-64. The Fourth Circuit substantially affirmed the decision of the Maryland District Court and demonstrated at length that "any national security justification for EO-2 . . . was offered as more of a 'litigating position' than as the actual purpose of EO-2." J.A. 225.

On March 29, 2017, the Hawaii District Court issued a preliminary injunction barring enforcement of Sections 2 and 6 of the Amended Order. J.A. 1163. The Hawaii District Court found that "the record here" is "full of religious animus, invective and *obvious pretext*." J.A. 1157 (emphasis added).

On June 12, 2017, the Ninth Circuit affirmed the preliminary injunction against Sections 2(c), 6(a), and 6(b) of the Amended Order. J.A. 1236. The court held that these Sections contravened a number of provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.* Among other things, the decision explained that the Amended Order and the Government have "specifically avoid[ed] making any finding that the current screening procedures are inadequate." J.A. 1203.

ARGUMENT

I. This Court Has Authority To Compare The Amended Order's Asserted Rationale With The Administration's Statements And Official Statistics.

This Court's judicial review could stop with comparing the Amended Order's asserted rationale with the Administration's own public statements and official statistics. This comparison provides a dispositive basis for affirming and does *not* involve either balancing or substituting this Court's national security judgment for the President's. First, as Part II demonstrates, the *Administration's own* public explanations and statistics have severed any connection between (a) the Amended Order and (b) its purported statutory authority, 8 U.S.C. § 1182(f), and national security rationale. The Amended

Order states that its statutory authority rests on the need to prevent the "detriment[]" of "*unrestricted entry* into the United States of nationals" of the six designated countries. J.A. 1426, 1434 (emphasis added). But before the President extended the bans on June 14, 2017, the Administration's own statements and statistics established that *without* any ban, the entry of these nationals and refugees had been and would remain heavily restricted. Specifically, while the ban was completely enjoined, the President stated on June 5, 2017, that his Administration was subjecting *all* entrants to "extreme vetting." *See infra*, at 17. Indeed, visa issuances to nationals of the six designated countries were cut by 55% by April 2017. *See infra*, at 18.

Second, as Part II also demonstrates, under the Establishment Clause, a review of the same public record shows that the Amended Order's national security assertion is, at best, "secondary to a religious objective" of banning the entry of Muslims. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864 (2005). The Government's national security assertion has been that *temporary* bans were ordered to enable the Administration to establish *adequate* vetting. *Infra*, at 14. But the Administration had established "extreme vetting" by June 5, 2017. Yet the President subsequently extended the bans on June 14, 2017. The plain, undebatable *public* record of Administration statements and official statistics therefore debunks that improving vetting is the primary objective of the Amended Order. There is thus no need for "judicial psychoanalysis." *Id.* at 862. This is especially so as it is equally unconstitutional under the Establishment Clause, whether the primary objective of a government action is religious discrimination, or an opportunistic, public appeal to religious prejudice. *Cf.*

Edwards v. Aguillard, 482 U.S. 578, 594 (1987) (finding "violation" where "primary purpose" was "to *endorse* a particular religious doctrine") (emphasis added).

Comparing the Administration's rationale with its own subsequent statements and statistics is well within this Court's authority. National security is not a "talismanic incantation" that obviates judicial review. *United States v. Robel*, 389 U.S. 258, 263 (1967). This Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). "Security subsists, too, in fidelity to freedom's first principles." *Boumedine v. Bush*, 553 U.S. 723, 797 (2006).

The Government's argument against considering the Administration's own statements and statistics contradicts the controlling concurrence of Justice Kennedy, joined by Justice Alito, in *Kerry v. Din*, 135 S. Ct. 2128 (2015). That concurrence looked beyond the consular officer's official decision to evidence that the particular visa applicant "worked for the Taliban government, which . . . provides at least a factual connection to terrorist activity." *Id.* at 2141. That concurrence also stated that courts properly look beyond the stated reason for the denial of a visa when there is "an affirmative showing of bad faith . . . ." *Id.* Even by itself, extending the bans after the purported reason for them had ended shows bad faith. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (When the "sheer breadth [of government action] is so *discontinuous with the reasons offered for it* that the [action] seems *inexplicable by anything but animus toward the class it affects*; it lacks a rational relationship to legitimate state interests.") (emphasis added).

In contrast, there were neither explanations by the President nor official statistics that contradicted a purported reason in any case relied on by Petitioners. The visa applicant in *Kleindienst v. Mandel*, 408 U.S. 753, 758 (1972), did not rely on publicly-stated reasons different from those offered by the sole decision maker, the consular official. *See also Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) ("This is not to say . . . that the Government's power in this area [of immigration] is never subject to judicial review.").

Judicial reliance on the public record of Administration statements and official statistics for the limited purposes described above does not open the door to routine legal challenges to, much less discovery concerning, visa denials. By definition, reliance on *public* statements and *public* statistics is the opposite of attempting to discover a *secret* reason.

The Government properly does not assert that its constitutional or statutory interpretations in this case should be accorded deference. Hamilton wrote in Federalist Paper No. 78 that the function of interpreting and enforcing the Constitution "belong[s] to" the judicial role. Alexander Hamilton, *The Federalist No. 78*, INDEPENDENT JOURNAL (June 14, 1788) ("Federalist No. 78"), *available at* http://bit.ly/2xlVLnJ. Hamilton also explained that the judicial role includes deciding "the meaning of any particular act proceeding from the legislative body." *Id.* This should be particularly so for the immigration statutes at issue in this case.

To start, the President's interpretations of immigration statutes here would create, at a minimum, serious constitutional issues. This supplies a reason to reject

these interpretations, not to defer to them. *See, e.g., I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001). *See also Wong Wing Hang v. I.N.S.*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.) ("Congress could not have intended" to give the executive branch authority to rest an immigration decision "on an impermissible basis such as invidious discrimination against a particular race *or group*.") (emphasis added).

Constitutional history further cautions against deference here. The Declaration of Independence lists "obstructing the laws for Naturalization of Foreigners" and "refusing to pass [persons] to encourage their migrations hither" as among the acts of "absolute Tyranny" of "the present King of Great Britain." DECLARATION OF INDEPENDENCE (U.S. 1776). Not surprisingly, Article I, section 8, clause 4 of the Constitution gives the power to make rules for immigration "exclusively to Congress," *not* to the executive. *Galvan v. Press*, 347 U.S. 522, 531 (1954). Deference to the President in interpreting immigration statutes that give him only *limited* authority risks improperly transferring the immigration power conferred on Congress to the President.

Indeed, President Trump stated on September 5, 2017, that in the "immigration" context, a President should not be "able to rewrite or nullify federal laws" by adopting in an executive order an approach that "Congress repeatedly rejected . . . ." But the Amended Order's travel and refugee bans do exactly that. Press Release, The White House Office of the Press Secretary, Statement from President Donald J. Trump (Sept. 5, 2017), http://bit.ly/2xM12Zc.

For example, in 2015, Congress addressed travel by nationals of the six designated countries. Congress enacted the Visa Waiver Program Act ("Visa Waiver Act") codified in 8 U.S.C. § 1187(a)(12). Congress rejected a ban.[2] As implemented by the Department of Homeland Security ("DHS"), the Visa Waiver Act requires visas for nationals of the six designated countries, *see* Pet. Br. at 5-6, but does *not* ban travel. Under the Visa Waiver Act, nationals of the six countries "go through the full vetting of the *regular* visa process, which includes *an in-person interview at a U.S. embassy or consulate.*" Karoun Demirjian & Jerry Markon, *Obama administration rolls out new visa waiver program rules in wake of terror attacks*, Wash. Post (Jan. 21, 2016), http://wapo.st/2sERVn1 (emphasis added); U.S. Customs and Border Protection, *Visa Waiver Program*

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2. The House had passed the American Security Against Foreign Enemies Act of 2015 ("SAFE Act"). American Security Against Foreign Enemies Act of 2015, H.R. 4038, 114th Cong. (2015). It would have banned any refugees from Syria or Iraq absent *personal*, unanimous certifications by the Secretary of DHS, the FBI Director, and the Director of National Intelligence that the *specific* refugee was not a security threat. *Id.* at § 2(a). The SAFE Act would have operated as a ban. *See* Evan Perez, *First on CNN: FBI Director James Comey balks at refugee legislation*, CNN (Nov. 19, 2015), http://cnn.it/1Ngw5ik ("Comey has told administration and congressional officials that the legislation would make it impossible to allow any refugees into the U.S., and could even affect the ability of travelers from about three dozen countries that are allowed easier travel to the U.S. under the visa waiver program, the officials say."). But the Senate did not pass the SAFE Act, as a cloture vote failed. *See* H.R. 4038 (114th): American Security Against Foreign Enemies Act of 2015, CONGRESS.GOV, http://bit.ly/2w3XhK7. Instead, both houses of Congress enacted the compromise Visa Waiver Act by large margins. *See* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, H.R. 158, 114th Cong. (2015).

Improvement and Terrorist Travel Prevention Act Frequently Asked Questions (June 19, 2017), http://bit.ly/1Tz4wRn. Since such vetting began, the Government cites *no terrorist attack or attempted terrorist attack* in this country by any national of any of the six countries. As the Ninth Circuit held, the Amended Order's bans operate to nullify the Visa Waiver Act. *See* J.A. 1204-05.

Congress also has provided in 8 U.S.C. § 1182(a)(3)(B) "*specific* criteria for determining terrorism-related inadmissibility." *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., joined by Alito, J., concurring) (emphasis added). To hold that the Amended Order's blanket travel and refugee bans have statutory authority would impermissibly nullify the "specific criteria" in Section 1182(a)(3)(B).

The Court should fulfill its judicial role. As has been attributed to Edmund Burke: "The only thing necessary for the triumph of evil is for good men to do nothing." *See* Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 Personality and Soc. Psychol. Rev. 193, 206 (1999). This applies to good judges.

II. No National Security Rationale Supported The Extension Of The Travel And Refugee Bans After This Administration Achieved "Extreme" Vetting.

When a rule is extended after its stated reason is over, that purported reason cannot support the rule. That is the story of the national security rationalization for the travel and refugee bans.

A. The Amended Order's Rationale Was That "Short" Bans Would Enable "Adequate" Vetting.

The Government repeatedly has represented to this Court and the courts below that the reason for the "short" and "temporary" travel and refugee bans was to allow this Administration to establish "current screening and vetting procedures [that] are *adequate* to detect terrorists seeking to infiltrate this Nation." Application (16A1190) for a Stay, No. 16-1436, *Trump v. Int'l Refugee Assistance Project*, at 8, 30 (June 1, 2017) (emphasis added); Brief for Appellants at 1-2, 10, 12, 36, 43, No. 17-15589, *Hawaii v. Trump* (9th Cir. Apr. 7, 2017), ECF No. 23; *see also* Pet. Br. at 49-50 (bans are a "temporary pause" to "allow a review precisely to determine whether adequate screening is in place"). But that rationale cannot sustain the bans. This is because those bans were extended on June 14, 2017, *after* President Trump stated on June 5, 2017 that his Administration had achieved "extreme vetting" *while* the travel and refugee bans were completely enjoined. Indeed, nothing in the Government's brief even asserts that, at the time of the extension, *this Administration's* "extreme vetting" was inadequate somehow either for nationals of the six countries designated in the Amended Order because of problems in those countries or for refugees.

B. This Administration Implemented "Extreme Vetting" By June 5, 2017.

Section 5(a) of the Amended Order was *never* enjoined. Pursuant to Section 5(a):

> The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence *shall implement a program*, as part of the process for adjudications, *to identify individuals* who seek to enter the United States on a fraudulent basis, *who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry. This program shall include* the development of *a uniform baseline for screening and vetting standards and procedures, such as in-person interviews*; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; *amended application forms that include questions aimed at identifying* fraudulent answers and *malicious intent*; a mechanism to ensure that applicants are who they claim to be; *a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States;* and *any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.*

J.A. 1432 (emphasis added).

By June 5, 2017, this Administration had "implement[ed]" the additional screening and vetting

that Section 5(a) of the Amended Order required for all potential entrants, including nationals of the six countries and refugees. For example, on March 17, 2017, the State Department adopted enhanced visa screening by requiring longer interviews, more detailed questions by consular officials, and a "mandatory social media review" by the "Fraud Prevention Unit" if an "applicant may have ties to ISIS or other terrorist organizations or has ever been present in an ISIS-controlled territory . . . ." Brief of *Amicus Curiae* T.A. at 12, 56, 70, No. 17-15589, *Hawaii v. Trump* (9th Cir. Apr. 7, 2017), ECF No. 114 (State Dep't Cable 25814 ¶¶ 8, 10, 13, *available at* http://bit.ly/2o0wBqt).[3] On April 27, 2017, the Administration issued a new rule that adds a question to the Electronic Visa Update System, asking for information associated with an applicant's "online presence," meaning information related to his or her "Provider/Platform"; "social media identifier"; and "contact information." 82 Fed. Reg. 19380 (Apr. 27, 2017). On June 1, 2017, the State Department promulgated a new supplemental questionnaire for visa applicants that asks applicants to list (1) every place they have lived, worked, and traveled internationally—including how such travel was funded—for the past fifteen years; (2) every passport they have ever held, including number and country of issuance; (3) names and birth dates of all siblings, children, spouses, and partners; and (4) every social media handle, phone number, and e-mail address they have used for the past five years. U.S. Dep't of State, Supplemental Questions for Visa Applicants (2017), http://bit.ly/2wzoatR. In addition, during the first six months of the 2017 fiscal year, searches of electronic

3. Even before this Administration, *every* refugee was vetted by *numerous* federal agencies and the office of the United Nations High Commissioner for Refugees. *See Hawaii v. Trump*, 859 F.3d 741, 775 n.17 (9th Cir. 2017).

devices of international travelers arriving at U.S. airports increased 36.5%. U.S. Customs and Border Prot., *CBP Releases Statistics on Electronic Device Searches* (Apr. 11, 2017), http://bit.ly/2oyyLAu.

President Trump himself has established that his Administration's vetting had surpassed adequate while the travel and refugee bans were fully enjoined and before the President extended the bans. By April 29, 2017, President Trump wrote that his Administration was "substantially improv[ing] vetting and screening." *See* Donald J. Trump, *President Trump: In my first 100 days, I kept my promise to Americans*, Wash. Post (Apr. 29, 2017), http://wapo.st/2s7BmUg ("Visa processes *are being reformed* to substantially improve vetting and screening . . . .") (emphasis added). On June 5, 2017, although the President disparaged the injunctions against the "Travel Ban," President Trump admitted: "*In any event we are* EXTREME VETTING people coming into the U.S. in order to help keep our country safe." Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017 6:37 a.m. and 6:44 a.m.), http://bit.ly/2rtbEIK and http://bit.ly/2etglyy (emphasis added; capitalization in original). Thus, the Administration had implemented "extreme vetting" for all entrants *without* any ban or any change in vetting cooperation from any of the six designated countries. The next day, the White House Press Secretary stated that the President's tweets are "considered official statements by the President of the United States." Aric Jenkins, *Sean Spicer Says President Trump Considers His Tweets 'Official' White House Statements*, Time (June 6, 2017), http://ti.me/2rT57aO.[4]

4. Thus, the President's "official statements" prove that a March 10, 2017 letter to him from more than 130 generals and national

The proof of the pudding is in the eating. Comparing April 2017—when the Amended Order's bans were entirely enjoined—to the 2016 monthly averages, non-immigrant visa issuances were down 15% among all countries, 20% among Muslim-majority countries, almost 30% among Arab countries, and *55% among the six countries designated by the Amended Order.* Nahal Toosi and Ted Hesson, *Visas to Muslim-majority countries down 20 percent*, Politico (May 25, 2017 10:28 EDT), http://politi.co/2r0XBHQ.

C. There Is No Vetting Rationale For The President's Subsequent June 14, 2017 Extension Of The Bans.

Because the Administration had achieved "extreme vetting" by June 5, 2017, the bans should have ended without an extension. Under the Amended Order's plain meaning, *the* "Effective Date" of "[t]his order" was defined as "March 16, 2017," the travel ban was set to end "90 days from *the effective date of this order*," and the refugee ban was set to end "120 days after *the effective date of this order*." J.A. 1426-1427; 1439 (emphasis added). Because the bans had run from "*the* effective date of this order"—March 16, 2017—the travel ban was set to expire

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security experts from across the political spectrum—including two former Secretaries of the Department of Homeland Security—had been correct. That letter explained that the United States would be able to "implement any necessary [vetting] enhancements without a counterproductive ban or suspension on entry of nationals of particular countries or religions." Brief of *Amicus Curiae* T.A., Ex. 5, CV. No. 17-00500-DKW-KJM, *Hawaii v. Trump* (D. Haw. Mar. 14, 2017), ECF No. 201-5 (Nat'l Security Experts' Mar. 10, 2017 Letter to President Trump, *available at* http://politi.co/2klc2FU).

on June 14, 2017, and the refugee ban on July 14, 2017. *Cf., e.g., Freytag v. Comm'r*, 501 U.S. 868, 902 (1991) ("[t]he definite article 'the' obviously narrows . . ."); *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("The consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent . . . .").

Instead, the President, on June 14, 2017, "revise[d]" the Amended Order to *extend* the travel ban until at least September 24, 2017, and the refugee ban until at least October 24, 2017. Pet. Br. at 37; J.A. 1442. Therefore, the ban periods in effect at the time of this Court's oral argument were promulgated *after* this Administration had achieved "extreme vetting" and the resulting reduction in visa issuances.

Consequently, the bans are adrift from any statutory mooring on which they purport to be based. Section 2(c) of the Amended Order rested the travel ban on the statement that "the *unrestricted* entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States." J.A. 1426 (emphasis added). But the "extreme vetting" and 55% reduction in visas achieved *before* the extension are the opposite of "unrestricted entry."[5]

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5. Indeed, the extension violates President Trump's campaign promise: "I don't want people coming in from the terror countries . . . *unless they're very, very strongly vetted.*" Ali Vitali, *In His Words: Donald Trump on the Muslim Ban, Deportations*, NBC News (June 27, 2016, 4:58 p.m. ET), http://nbcnews.to/2vx0d6C (emphasis added). In a Presidential debate, he similarly promised "extreme vetting from certain areas of the world." J.A. 1015, 1133 (citing The American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016), *available at* https://goo.gl/iIzf0A).

Nothing in the prior Amended Order supports continuation of the bans after this Administration implemented "extreme vetting." The Amended Order had cited only one example that involved a native of any of the six designated countries. "[I]n October 2014, a native of Somalia *who had been brought to the United States as a child refugee* and later *became a naturalized United States citizen* was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon." J.A. 1424 (emphasis added). The Amended Order, however, could not claim that this United States national was radicalized before he came to this country as a three-year-old "child refugee" who attempted terrorism sixteen years later. *Hawaii v. Trump*, 859 F.3d at 775 n.16. So this lone instance cannot support a suggestion that vetting for nationals of the six countries ever was inadequate, much less that it remains so, despite this Administration's "extreme vetting."

The conclusory March 6, 2017 letter from the Attorney General and Secretary of DHS, cited by Petitioners' Brief at 7, similarly does not support the extension of the travel and refugee bans. That letter did not and could not address whether this Administration's own "extreme vetting" procedures, put in place *after* the March 6, 2017 letter, are currently adequate for nationals of the six countries and refugees. Even when issued, that letter was not joined by the then-senior national security officials with the most anti-terrorism experience—namely, then-FBI Director James Comey and NSA Director Admiral Michael Rogers. Moreover, the letter is belied by the President's subsequent admissions that the Amended Order is merely a "watered-down version of the first

order." J.A. 183 (citing Appellees' Br. 7) (citing Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,'* Time (Mar. 16, 2017), *available at* http://ti.me/2o09ixe); *see also* Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017 3:29 a.m.), http://bit.ly/2rDbHzY ("The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C."). That first executive order was issued "*without* consulting the relevant national security agencies." J.A. 224 (emphasis added).[6]

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6. Before the Amended Order, a senior White House official was quoted as stating that "DHS and DOJ are working on an intelligence report that will demonstrate that the security threat for these seven countries is substantial and that these seven countries have all been exporters of terrorism into the United States." Jake Tapper & Pamela Brown, *White House Effort to Justify Travel Ban Causes Growing Concern for Some Intelligence Officials*, CNN Feb. 25, 2017), http://cnn.it/2kSAkZB. Instead, the Government's vetting review produced "internal reports" that "contradict th[e] national security rationale" for the travel ban. J.A. 225. A DHS internal report, made public on February 25, 2017, concluded that being a national from one of the six countries is an "unlikely indicator" of terrorism threats against the United States. J.A. 1051-56. A second DHS report, dated March 1, 2017, concluded that "most foreign-born, U.S.-based violent extremists [are] likely radicalized several years *after* their entry to the United States." J.A. 1059. Internal FBI data also "undermine[d] a key premise of the travel ban" because that data revealed that "most" foreign nationals who have posed a risk to the United States came from "countries unaffected" by the Amended Order. *See* Devlin Barrett, *Internal Trump Administration Data Undercuts Travel Ban*, Wash. Post (Mar. 16, 2017), http://wapo.st/2nVszOX. In sum, a "significant amount of internal government data" demonstrated the travel ban was "not likely to be effective in curbing the threat of terrorism in the United States." *Id.*

The June 14, 2017 extension also inexplicably did not remedy even the most obvious disconnect between the travel ban and a purported lack of cooperation in vetting by the six countries. The ban still applies to "nationals of the six countries *without* significant ties to the six designated countries, such as those who left as children or whose nationality is based on parentage alone . . . . Yet nationals of other countries who do have meaningful [current] ties to the six designated countries . . . fall outside the scope of Section 2(a)." J.A. 1202–03 (emphasis added). Thus, the Amended Order would ban travel by a doctor who is a Sudanese national but who lives, works, and would be vetted by a U.S. consular official in Saudi Arabia. J.A. 1024 (citing Jane Morice, *Two Cleveland Clinic doctors vacationing in Iran detained in New York, then released*, Cleveland.com (Jan. 29, 2017), *available at* https://goo.gl/J8x2iu). But the Amended Order permits travel by a Saudi national with no job at all who lives, and would be vetted, in Sudan.

This disparity already had produced absurd results before the June 14, 2017 extension. Groups of *Canadian girl scouts and school children* would not visit the United States because their groups contain some young people who reside in Canada but are nationals of the six countries. *See* Derek Hawking, *Worried about Trump's travel ban, Canada's largest school district calls off U.S. trips*, Wash. Post (Mar. 24, 2017), http://wapo.st/2nVbHrP.

The Government's brief does not provide even a *post hoc* vetting justification for the June 14, 2017 extension of the bans. This omission is particularly telling as *before* the Government's brief, the Government had received the 20-day report required by Sections 2(a) and (b) of the

Amended Order. Farhana Khera and Johnathan J. Smith, *How Trump Is Stealthily Carrying Out His Muslim Ban*, N.Y. Times (July 18, 2017), http://nyti.ms/2u5Ay0J.

If the Government belatedly argues in its reply that "extreme vetting" is somehow not enough vetting, this transparent litigation tactic would be an improper new reply brief argument. *See, e.g.*, S. Shapiro, *et al.*, Supreme Court Practice § 6.38, p. 511 (10th ed. 2013). Most important, any new argument would be even farther removed from the Amended Order's rationale that "detriment" resulted from "*unrestricted* entry." J.A. 1426 (emphasis added). *See Romer*, 517 U.S. at 635 (government's "particular justifications" are "impossible to credit" when the "breadth" of government action is "so far removed" from those justifications).

The unfortunate but inescapable conclusion is that the actual basis for the June 14, 2017 extension of the travel and refugee bans was fulfilling the President's pledges to ban Muslims. The President *as President* has confirmed this. He stated on June 3, 2017 that a London terror attack by three Muslims *who would not be banned by the Amended Order* show why "[w]e need the Travel Ban." *Supra*, at 4. The President's linking of terror by Muslims with his purportedly narrower bans explains why the President extended the bans *after his Administration* achieved "extreme vetting." *Supra*, at 18-19. The President's bans were and are about fulfilling his pledge to ban Muslims. They are not—and never were—about the adequacy of vetting for nationals of the six designated countries or refugees.

III. In Accord With The Applicable Statutory And Constitutional Texts, This Court Should Enjoin All Prospective Applications Of The Amended Order's Illegal Travel And Refugee Bans.

This is not a case where splitting the baby would be a Solomonic decision. Consider, for example, a ruling by this Court that Respondents have standing and prevail on the merits, but that would restrict injunctive relief so as to enable bans against travelers and refugees who lack a prior bona fide relationship with a person or entity in the United States (hereinafter, "a Prior U.S. Relationship"). This Court should reject any such restriction for at least four reasons.

First, the plain meaning of the pertinent INA provisions precludes restricting their prescriptions to aliens with a Prior U.S. Relationship. 8 U.S.C. § 1182(f) prescribes conditions that apply "[w]henever" the President seeks to suspend "the entry of *any* aliens or *any* class of aliens . . . ." 8 U.S.C. § 1157(a)(2) prescribes conditions that apply whenever the President seeks to limit "the number of refugees." 8 U.S.C. § 1182(a)(3)(B) sets conditions for denying admission to "*[a]ny* alien" based on potential terrorism. (emphasis added). 8 U.S.C. § 1152(a)(1)(A) prescribes that "*no person* shall . . . be discriminated against" based on nationality with four express statutory exceptions. *Id.* (emphasis added). The lack of a Prior U.S. Relationship is not one of the exceptions. The Visa Waiver Act applies to *all* nationals of the six countries. *Supra*, at 12.

Second, the express limits imposed by the Establishment Clause also apply to a government-

wide order issued in the United States to deny entry to foreigners, including those without a Prior U.S. Relationship. In 1787, the Constitution gave the power to make *laws* on foreign immigration to Congress. Two years later, the Establishment Clause was proposed for ratification. It provides: "Congress shall make *no law* respecting *an* establishment of religion . . . ." U.S. CONST. Amend. I (emphasis added). That Clause therefore applies to immigration laws and rules, without any exception permitting religious discrimination toward those who lack a Prior U.S. Relationship.

The Government cites *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), for the proposition that "[a]liens abroad have no Establishment Clause rights." Pet. Br. at 35 n.13. That both misreads *Verdugo-Urquidez* and ignores the comprehensive language of the Establishment Clause. *Verdugo-Urquidez* was expressly limited to the Fourth Amendment, "the particular provision[] in question . . . ." 494 U.S. at 273. The Court held that the reach of the Fourth Amendment was circumscribed by its use of the term "the right of the people." *Id.* at 265. The Court emphasized that "in some cases, [other] provisions extend beyond the citizenry." *Id.* at 269.

Justice Kennedy's concurrence, which was necessary for the majority, was even narrower. It held only that, because it would be "impracticable and anomalous," the "Fourth Amendment's warrant requirement should not apply [abroad] as it does in this country." *Id.* at 277-78. Justice Kennedy emphasized that in general "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Id.* at 277.

Unlike the Fourth Amendment, the First Amendment's Establishment Clause is not circumscribed by the term "the right of the people." This omission is particularly telling as, in sharp contrast to the Establishment Clause, the First Amendment's protection of peaceful assembly extends only to "the right of the people." By using the term "no law" without modification, the Establishment Clause prescribes a comprehensive limit on government action whether foreign or domestic.

Nor would it be impracticable or anomalous for the Establishment Clause to apply to a President's government-wide order that is issued in this country and implemented here and in U.S. consular offices. Our country has long admitted foreign travelers, immigrants, and refugees, including those who lack a Prior U.S. Relationship, while complying with various U.S. laws. Indeed, the inscription on the Statue of Liberty does *not* request "your tired, your poor, your huddled masses yearning to breathe free, *if they have a Prior U.S. Relationship.*"

Third, when considering a preliminary injunction, a court envisages what the final judgment likely will provide. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.") (citations omitted). Here, the district court's final judgment is readily envisioned should the Respondents prevail in this Court on their standing and the merits. Such a merits ruling by *this Court*—unlike a lower court ruling or a stay *pending* review—will conclusively establish the law *in every venue* that Sections 2(a), 6(a), and 6(b) of the Amended Order violate both statutory and constitutional limits. The subsequent final

judgments of the two district courts ineluctably will therefore provide declaratory relief to the same effect. It makes no sense in this case for the final injunctive relief, or preliminary injunctive relief, to be narrower than this Court's invalidation of Sections 2(c), 6(a), and 6(b).

Such a dichotomy would invite mischief against the rule of law. Indeed, the Administration states that, should *this Court* rule that Sections 2(c), 6(a), and 6(b) "are invalid on their face," the Administration would nonetheless apply those Sections in countless circumstances *unless* the Court also enjoins the Administration from such applications. Pet. Br. at 82–83.

Fourth, were this Court to exclude those without a Prior U.S. Relationship from the scope of the INA and the Establishment Clause, the cure would be worse than the disease. Any President could restrict travel, immigration, and refugees to foreigners who were Christians, unless a non-Christian had a Prior U.S. Relationship. Most Jewish refugees from Hitler could have been banned, and more than one billion foreign Muslims could be banned now.

Eight Justices of this Court have indicated that he or she would never join a decision like *Korematsu v. United States*, 323 U.S. 214 (1944). Chief Justice Roberts is typical. The Chief Justice testified that if a case "like" *Korematsu* came before the Court, "I would be surprised if there were any arguments that could support it." *U.S. Senate Judiciary Committee Holds A Hearing On The Nomination Of John Roberts To Be Chief Justice Of The Supreme Court*, 109th Cong. (2005), 2005 WL 2214702, at *22.[7]

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7. Justices Ginsburg and Breyer similarly rejected *Korematsu*. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 275 (1995)

Perhaps most instructive is the "Reading List of Justice Anthony M. Kennedy," entitled "Understanding Freedom's Heritage: How to Keep and Defend Liberty," which is *available at* http://bit.ly/2iZXm08 (hereinafter, "Liberty Reading List"). Justice Kennedy's Liberty Reading List includes the *dissent* of Justice Murphy in

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(Ginsburg, J., dissenting) (*Korematsu* "yielded a pass for an odious, gravely injurious racial classification[.] A *Korematsu*-type classification . . . will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited."); Stephen Breyer, *Making Our Democracy Work: A Judge's View*, 193 (Knopf, 2010) (*Korematsu* "has been so thoroughly discredited, that it is hard to conceive of any future court referring to it favorably or relying on it."). Justice Alito testified that the "Japanese internment cases . . . were one of the great constitutional tragedies that our country has experienced . . . ." *U.S. Senate Judiciary Committee Holds A Hearing On The Nomination Of Judge Samuel Alito To The U.S. Supreme Court*, 109th Cong. (2006), 2006 WL 45940, at *150–51. Justice Sotomayor testified that *Korematsu* "was wrongly decided." *U.S. Senate Committee On The Judiciary Holds A Hearing On The Nomination Of Judge Sonia Sotomayor To Be An Associate Justice Of The U.S. Supreme Court*, 111th Cong. (2009), 2009 WL 2027303, at *79. Justice Kagan gave *Korematsu* as *the* example of a "poorly reasoned" Supreme Court decision. *Responses to Supplemental Questions from Senators Jeff Sessions, Orrin Hatch, Charles Grassley, Jon Kyl, Lindsey Graham, John Cornyn, and Tom Coburn, available at* http://bit.ly/2oI0aAf. When Justice Gorsuch was asked whether *Korematsu* has any precedential value in any case that may come before the Supreme Court, he testified, "no." Senator Mazie K. Hirono, *Questions for the Record following Hearing on March 20-23, 2017 entitled: "On the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States,"* Senate Judiciary Committee (Mar. 20-23, 2017), *available at* http://bit.ly/2pmtWHD. *See Generally Steinberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (describing "*Korematsu* and *Dred Scott*" as occupying the worst "place in the history of this Court's jurisprudence").

Korematsu as what the Ninth Circuit website describes as containing some of the "key principles that are integral to our nation's DNA." Justice Murphy stated that even claims by the executive branch regarding military necessity "must [be] subject" to the "judicial process of having . . . reasonableness determined . . . ." *Korematsu*, 323 U.S. at 234. That reasonable "relation" was "lacking" because the internment order simply "assum[ed] that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy." *Id.* at 235. However, no "reason, logic or experience could be marshalled in support of such an assumption." *Id.*; *see also id.* at 240 (rejecting "infer[ence] that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group").

What unavoidably remained, Justice Murphy explained, as the underlying basis for the internment was "an accumulation of much of the misinformation, half-truths, and insinuations that for years have been directed against Japanese Americans by *people with racial and economic prejudices—the same people who have been among the most foremost advocates* of the evacuation." *Id.* at 239 (emphasis added). Justice Murphy explained that even a "military judgment" in wartime that was "based upon such racial and sociological considerations is not entitled to the great weight" ordinarily given to military assessments. *Id.* at 239–40. Justice Murphy concluded:

> Racial discrimination *in any form and in any degree* has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free

> people who have embraced the principles set forth in the Constitution of the United States.

Id. at 242 (emphasis added).[8]

The Administration likewise has provided no "reason, logic or experience," *id.* at 235, in support of the Amended Order's ongoing bans. In particular, there is no support that nationals of the six countries and refugees may possess some inherent tendency to commit terrorism in the United States that this Administration's "extreme vetting" would not adequately detect. *See* Part II, *supra.*[9]

Instead of providing any supporting reason, logic, or experience, President Trump has attempted to intimidate the federal judiciary: "*If* something happens, blame [the

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8. In the highest tradition of the bench, Justice Murphy ignored partisan and personal loyalties. President Roosevelt had appointed Justice Murphy three times: as Governor General of the Philippines, Attorney General, and Justice.

9. Then-Candidate Trump attempted to support his proposed bans by citing the Japanese internment, telling reporters, "[Roosevelt] did the same thing." J.A. 1013 n.15 (citing Jenna Johnson, *Donald Trump says he is not bothered by comparisons to Hitler*, Wash. Post (Dec. 8, 2015), https://goo.gl/6G0oH7). Taking the wrong page from history again, President Trump has asserted that Muslims do not assimilate in Western societies. See Chris Cillizza, *Donald Trump's explanation of his wire-tapping tweets will shock and amaze you*, Wash. Post (Mar. 16, 2017), http://wapo.st/2o0QXzA. Similar assertions about non-assimilation were made to justify the Japanese internment. *See Hirabayashi v. United States*, 320 U.S. 81, 96 (1943). The Government's brief (Pet. Br. at 23) cites *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), which in turn relies in part on *Korematsu* and *Hirabayashi*. *See* 342 U.S. at 589 n.16, 591 n.17.

judge] and court system." Brief of *Amicus Curiae* T.A., Ex. 6, CV. No. 17-00050-DKW-KJM, *Hawaii v. Trump* (D. Haw. Mar. 14, 2017), ECF No. 201-6 (Donald J. Trump (@realDonaldTrump), Twitter (Feb. 5, 2017, 12:39 p.m. ET), *available at* http://bit.ly/2ojCwta) (emphasis added). Such intimidation is antithetical to our constitutional system. To start, constitutional and statutory constraints effectively would be discarded if they could be overridden by a suggestion that following them may increase some potential risk of terrorism or other horrific violence. If that were enough, one could ban the purchase of firearms because the San Bernardino and Orlando terrorists used guns.[10] Or ban the internet because foreign and domestic terrorists use the internet for recruitment, inspiration, and planning. Or ban interstate travel by white nationalists because for decades some of them have crossed state lines in traveling to commit terrorist attacks.[11] And so on.

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10. Indeed, President Trump has used the San Bernardino and Orlando shootings as support for his bans even though those terrorists were neither nationals of the six countries nor refugees. One day after the Orlando shooting, then-candidate Trump cited 8 U.S.C. § 1182(f) as a basis to "suspend immigration from areas of the world where there is a proven history of terrorism," explaining that "I called for a ban after San Bernardino, and was met with such great scorn and anger but now . . . many are saying that I was right to do so." Ryan Teague Beckwith, *Read Donald Trump's Speech on the Orlando Shooting*, Time.com (June 13, 2016 4:36 p.m. ET), http://ti.me/1XSQ8YS.

11. For example, in 1985, David Tate, a member of The Order—"a violent anti-Semitic group" that "committed armed robberies . . . and directed counterfeiting operations to finance a 'war' against the Federal Government"—traveled from Idaho to Missouri to murder a Missouri state trooper. *See* Wayne King, *Suspect Wanted in Shooting of Missouri Trooper is Arrested*, N.Y. Times (Apr. 21, 1985), https://goo.gl/xHT1hK; Associated Press, *AROUND THE*

But this Court addressed "terrorism" in *Boumedine* and held: "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumedine*, 533 U.S. at 798. The Framers decided that the Establishment Clause is an essential part of that framework.

As important, this Court must never surrender to intimidation. As Hamilton wrote in Federalist No. 78:

> This *independence of the judges* is equally *requisite* to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of *designing men*, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection,

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NATION; White Supremacist Gets Life for Killing Trooper, N.Y. Times (Jan. 8, 1986), http://nyti.ms/2wkuBAr. In 1995, Timothy McVeigh, "a disgruntled Army veteran who went on to declare war on the United States government," traveled from Arizona to Oklahoma to destroy the Alfred P. Murrah Federal Building. Christopher S. Wren, *McVeigh Is Executed for Oklahoma City Bombing*, N.Y. Times (June 11, 2001), http://nyti.ms/2vaTif6; Howard Witt, *In Arizona Town, Oklahoma Bombing Casts Dark Shadow Unwanted Fame Because Suspect Once Lived There*, Chi. Trib. (June 18, 1995), https://goo.gl/1tHdGN. And, recently, James Fields traveled from Ohio to Virginia to plow his car into a group of counter-protestors at a white nationalist rally, killing one and injuring others. *See* Jonah Engel Bromwich, Alan Blinder, *What We Know About James Alex Fields, Driver Charged in Charlottesville Killing*, N.Y. Times (Aug. 13, 2017), https://goo.gl/xzKdje.

> have a tendency, in the meantime, to occasion dangerous innovations in the government.

Alexander Hamilton, *The Federalist No. 78*, INDEPENDENT JOURNAL (June 14, 1788) (emphasis added), *available at* http://bit.ly/2xlVLnJ.

Likewise, then-Judge Cardozo wrote:

> The great ideals of liberty and equality are preserved against the *assaults of opportunism*, the expediency of the passing hour, the erosion of small encroachments, *the scorn and derision of those who have no patience with general principles*, by enshrining them in constitutions, and *consecrating to the task of their protection a body of defenders.*

Benjamin N. Cardozo, The Nature of the Judicial Process, 92-93 (1921) (emphasis added).

Our Constitution inoculates its "body of defenders" against presidential intimidation. As Justice Scalia said: "What can he do to me? Or to any of us? *We have life tenure* and we have it *precisely so that we will not be influenced* by politics, *by threats from anybody.*" Chris Wallace, *Justice Antonin Scalia on issues facing SCOTUS and the country*, Fox News Sunday (July 29, 2012), http://fxn.ws/2fZZBiB (emphasis added).

Experience teaches that half-measures do not assuage autocratic intimidation.[12] This Court's decision should

12. "History will teach us that . . . of those men who have overturned the liberties of republics, the greatest number have

resolve this matter once and for all with a prospective injunction that enforces the full scope of the applicable statutory and constitutional limits.

CONCLUSION

This Court should affirm the decisions of the Fourth and Ninth Circuits.

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Respectfully submitted,

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begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants." Alexander Hamilton, Federalist No. 1, cited in Liberty Reading List. The Bible in Proverbs 28:15 likens a "tyrant" to "a roaring lion, and a charging bear." *Proverbs 28:15* (International Standard Version). Pastor Martin Niemöller's iconic 1946 Lecture, "First They Came," cited in Liberty Reading List, illustrates the horrific consequences that can follow from attempts to appease nascent autocracy.